No. 77-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC LAND RESOURCES CORPORATION, SOUTHERN PACIFIC LAND COMPANY AND SANTA FE PACIFIC RAILROAD COMPANY AS *AMICI CURIAE*

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November 1978

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Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief.

OPINIONS BELOW

The opinions below are listed in the Brief of Petitioners and are set forth in Appendices A and B to the petition for writ of certiorari.[1]

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[1] The appendices contained in the petition for writ of certiorari are cited herein as "Pet. App."

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit were entered on May 17, 1977. Pet. App. vi. The Court of Appeals entered a supplemental opinion and order denying petitioners' timely petition for rehearing on February 28, 1978. Pet. App. xxi. The petition for writ of certiorari was filed on May 26, 1978, and granted on October 2, 1978. This Court has jurisdiction to review the opinion and judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 ("the Union Pacific Act") and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are set forth in Appendix C to the petition for writ of certiorari.

QUESTION PRESENTED

Whether Congress intended to reserve public rights-of-way across the lands granted by Congress under the Union Pacific Act, although there is no evidence of such an intent in the Act or its legislative history and although the United States has never before claimed any such rights-of-way in the some 110 years since the Act was passed.

INTERESTS OF AMICI CURIAE

1. *Union Pacific Land Resources Corporation (UP Land).*—UP Land is a wholly-owned subsidiary of Upland Industries Corporation, which in turn is owned by Union Pacific Corporation. Union Pacific Corporation also owns Union Pacific Railroad Company, which operates a 15,800-mile rail system in the western United States.

Under the Union Pacific Act of 1862 as amended, Congress granted to the first Union Pacific Railroad Company ("the Union Pacific") all the odd-numbered sections of public land within 20 miles of each side of its original right-of-way, extending from the Missouri River west to what is now the State of Utah. The even-numbered sections were retained by the Government, giving rise to a checkerboard pattern of alternating private and public ownership in a 40-mile belt along the railroad line. The primary purpose of the grant, which comprised a total of some 18.8 million acres, was to encourage and assist the Union Pacific in the construction of its railroad. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 59-60 (1878).

Over the past century, lands granted to the Union Pacific under the Act have been conveyed and reconveyed in countless separate transactions. UP Land presently owns the fee to the entire estate in some 865,000 acres of the original grant. Title to the other 18 million acres, subject to certain retained interests,[2] is dispersed among thousands of private owners, including the petitioners in the present case.

While this case is immediately concerned only with some 50,000 acres of grant lands in which petitioners own an interest, the decision below also directly affects the holdings of UP Land. The Court of Appeals has imputed to the 1862 Congress a heretofore undiscovered

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[2] UP Land holds various excepted and reserved interests in the grant lands that it or its predecessors conveyed to others.

intent to reserve an easement for public rights-of-way across *all* the lands granted under the Union Pacific Act. Pet. App. ix-xi. Since UP Land's grant-land holdings far exceed those of petitioners, the potential impact of the decision below on UP Land is far greater than the threat to the immediate parties.

2. *Southern Pacific Land Company (SP Land).*—SP Land is a wholly-owned subsidiary of Southern Pacific Company. Southern Pacific Company also owns Southern Pacific Transportation Company, which operates a 14,000-mile rail system in the West and Southwest.

The Southern Pacific system includes a line of railroad running from San Francisco to Utah, where it meets the original line of the Union Pacific. In the Union Pacific Act, Congress granted lands along the right-of-way of that Southern Pacific line to the Central Pacific Railroad Company of California. The grant to the Central Pacific was made on the same terms and conditions as the grant to the Union Pacific under the same Act,[3] and thus extended the checkerboard pattern of public and private ownership across the entire West.

Some eight million acres of land were ultimately conveyed under the grant originally made to the Central Pacific. SP Land presently holds fee title to approximately 1.8 million acres of those lands. Accordingly, SP Land has the same direct and substantial interest as UP Land in the decision of the Court of Appeals holding that Congress intended, without ever

[3] See Act of July 1, 1862, ch. 120, § 9, 12 Stat. 494, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

saying so, to reserve public rights-of-way across the lands granted under the Union Pacific Act.[4]

3. *Santa Fe Pacific Railroad Company (Santa Fe Pacific).*—Santa Fe Pacific is a wholly-owned subsidiary of Santa Fe Industries, Inc., which also owns all the stock of The Atchison, Topeka & Santa Fe Railway Company. The Santa Fe Railway operates some 12,000 miles of railroad between Chicago and California.

Santa Fe Pacific holds title to about 150,000 acres of the more than 13 million acres originally granted by Congress to its predecessor in title, the Atlantic & Pacific Railroad Company, under the Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294-95 ("the Santa Fe Act").[5] Like the grants under the Union Pacific Act, the Santa Fe grant was of odd-numbered sections on each side of the railroad right-of way. Thus, Santa Fe Pacific's grant lands are held in the same checkerboard pattern of ownership as are the grant lands of UP Land and SP Land.

Although the decision below does not address the intent of Congress in the Santa Fe Act, it nevertheless

[4] SP Land also holds fee title to some 1.7 million acres of lands originally conveyed from public to private hands by checkerboard grants made in three other railroad land-grant statutes. *See* Act of July 25, 1866, ch. 242, § 2, 14 Stat. 239-40; Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294-95; Act of March 3, 1871, ch. 122, § 9, 16 Stat. 573, 576. The court below did not address Congress' intent in any of these other acts; but its decision may nevertheless pose a risk for SP Land's interest in the lands granted under these acts as well. See p. 6, below.

[5] The properties of the Atlantic & Pacific Railroad Company were acquired by Santa Fe Pacific pursuant to the Act of March 3, 1897, ch. 374, § 1, 29 Stat. 622. Most of the granted lands were subsequently conveyed to other parties.

poses a substantial threat to Santa Fe Pacific's interest in the lands granted under that Act. The Court of Appeals' decision is not based on any express language in the Union Pacific Act or any underlying legislative history reflecting a congressional intent to reserve rights-of-way across the granted lands. See Pet. x-xi. Santa Fe Pacific is, therefore, confronted with the serious risk that the United States will assert in due course that the lower court's facile analysis of congressional intent is no less applicable to the Santa Fe grant than it is to the grants made in the Union Pacific Act.

STATEMENT OF THE CASE

Amici adopt the petitioners' statement of the case.

SUMMARY OF ARGUMENT

The question in this case is whether Congress intended, without saying so, to reserve public rights-of-way across the lands granted under the Union Pacific Act. It is undisputed that no intent to reserve rights-of-way was expressed by Congress in any manner, either in the Act itself or in its legislative history.

The Court of Appeals' sole ground for concluding that Congress intended to reserve such easements was its assumption that a prudent Congress seeking to encourage settlement of the West would have done so. But no need for reserved rights-of-way was apparent to the 1862 Congress, whose intent is controlling in construing the Union Pacific Act. By 1862, Congress had already made a number of checkerboard land grants without any provision for reserved rights-of-way, and no controversy had arisen suggesting that a reservation was required. Nor did the Government find it necessary

to assert any reserved right of access for more than 100 years after the Union Pacific Act was passed.

Even if the court's hindsight were more persuasive as to the need for a reservation in 1862, it still would not permit judicial implication of an unexpressed reservation for rights-of-way. Unexpressed reservations are not to be implied in congressional grants such as the Union Pacific Act, both because of the limited role of the judicial branch in construing those grants, and because of the long-recognized importance of certainty and predictability in matters affecting title to land.

The decision of the court below unsettles thousands of titles derived from the Union Pacific grants, covering vast areas of western land. The owners of these lands have relied not only on the unqualified language of the Act, but on the Government's failure to claim any reserved rights-of-way during the first some 110 years after the grants were made. The Secretary of the Interior recognized very early that the Act did not give the Government a right of access across granted lands without compensation to the owner; and consistently with that construction, the Government has frequently purchased rights-of-way from grant-land owners. This established administrative construction and practice precludes the belated implication of a reservation that has gone unasserted for so long.

The authorities relied upon by the Court of Appeals as reflecting some congressional and judicial recognition of the existence of reserved rights-of-way under the Union Pacific Act—namely, the Unlawful Inclosures Act of 1885 and two decisions of this Court that did not involve the Union Pacific Act or any other land-grant act—do not in fact support the decision reached

below. To the extent that those authorities have any relevance at all, they only provide further evidence that no rights-of-way were reserved.

Finally, nothing in the Court of Appeals' opinion provides any reliable basis for limiting the scope of the rights-of-way that it implied solely from an unexpressed intent. This lack of a limiting principle, such as the concept of minimum intrusion applicable to implied easements of necessity at common law, aggravates the cloud on land-grant titles resulting from the court's opinion, and confirms that unexpressed easements should not be implied in land-grant statutes. And if the Court of Appeals' holding were to be affirmed, this Court should at least make clear that the right of access implied must be narrow in scope, minimally intrusive, and reciprocally available for the benefit of private owners in the checkerboard seeking access across Government sections.

ARGUMENT

The Court of Appeals imputed to Congress an intent to reserve easements for public access across each section of the 34 million acres of land originally granted under the Union Pacific Act. Pet. App. xi. Such an intent was nowhere expressed by Congress; it is inconsistent with established administrative construction and practice under the Union Pacific Act; and it is unsupported by the authorities relied on by the court below.

I. Congress Did Not Intend Any Reservation for Rights-of-Way.

The question in this case is solely one of Congress' intent in making the Union Pacific grant.[6] There is

[6] This Court has repeatedly stressed that Congress' intent in making such grants should not be determined by reference to the rules of the common law, "which are properly applicable only to transfers between private parties." *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491, 497 (1878); accord, *e.g.*, *United States* v. *Southern P. R.R.*, 146 U.S. 570, 598 (1892); *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900). For this and other reasons (see p. 26 n. 42, below), it has been found in this case that the United States could not resort to rules of the common law to imply an easement that Congress did not reserve in making the Union Pacific grant.

no issue as to whether the public may obtain access to public-land sections in the land-grant checkerboards. As the Solicitor General has pointed out,[7] the question of public access to those sections has not been a matter of controversy during the century and more since the checkerboards were created. In the checkerboards, as elsewhere, the United States has the power to secure any necessary rights-of-way by the exercise of its power of eminent domain; and where it does so, established principles of just compensation ensure that it will not be compelled to pay more than a fair market price.[8]

The court below decided that where the United States requires rights-of-way across lands granted under the Union Pacific Act, it need not deal with the owners of such lands in the same fashion that it deals with other private landowners. Instead, the court purported to discover, 110 years after the fact, a right of access tacitly reserved by the 1862 Congress as a qualification of the Union Pacific grant. Such a congressional grant is "a law as well as a transfer of the property . . . ," *e.g.*, *Schulenberg* v. *Harriman*, 88 U.S.

[7] Brief of the United States, *et al.*, in Opposition to Petition for Certiorari, at 14 (Aug. 1978).

[8] See, *e.g.*, *United States* v. *Miller*, 317 U.S. 369 (1943); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913); *McGovern* v. *City of New York*, 229 U.S. 363, 371-72 (1913).

44, 62 (1874), and its terms must therefore be ascertained by reference to the intent of Congress, see, *e.g.*, *Wisconsin C. R.R.* v. *Forsythe,* 159 U.S. 46, 55 (1895); *United States* v. *Southern P. R.R.,* 146 U.S. 570, 598 (1892).

As an interpretation of congressional intent, the Court of Appeals' decision cannot stand. There is no evidence of any intent to reserve rights-of-way in the language or the legislative history of the Union Pacific Act, and no permissible ground for imputing such an intent to the 1862 Congress.

A. Congress Nowhere Expressed Any Intent to Reserve Rights-of-Way.

In ascertaining congressional intent, "[t]he starting point in every case . . . is the language" of the statute itself. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring); accord, *e.g., Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 492 (1977). As the Court of Appeals acknowledged (Pet. App. x), there is "no express reservation of an easement" in the Union Pacific Act. On its face, the Act gave unqualified and absolute title to the granted lands.[9]

[9] Section 3 of the Union Pacific Act provides: "That there be, and is hereby, granted to the said [grantee railroads] . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, . . . and within the limits of ten miles on each side of said road. . . ." Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358 (grant enlarged to encompass ten alternate sections per mile of railroad, within twenty miles on each side of the road). As this Court has previously observed, " 'There be and is hereby granted' are words of absolute donation . . . ." *Leavenworth, L. & G. R.R.* v. *United States,* 92 U.S. 733, 741 (1875).

Other provisions of the Act affirmatively indicate that Congress intended no qualification of the grantees' titles. The Act expressly excepts from the grant various categories of property, including lands to which preemption or homestead claims had attached and lands that had already been sold, reserved or otherwise disposed of by the United States.[10] Had Congress also intended to reserve rights-of-way, that reservation too —as this Court has previously recognized in analogous circumstances—would almost certainly have been expressed; the fact that none was expressed would appear "conclusive" that none was intended. See *Railroad Co.* v. *Baldwin,* 103 U.S 426, 430 (1881). See also *Stuart* v. *Union P. R.R.,* 227 U.S. 342, 353 (1913).[11]

The legislative history of the Act serves only to confirm this conclusion. Nowhere in the legislative history is there *any* suggestion that Congress intended to reserve rights-of-way. On the contrary, the legislative history reveals that proposals for reservations to allow access over the granted lands were unsuccessfully raised in the consideration of both the 1862 Act itself

[10] See Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

[11] Congress has long made *express* provision for reservations in other contexts in which it wished to reserve rights-of-way. See Act of Aug. 30, 1890, ch. 837, § 1, 26 Stat. 391, *codified in* 43 U.S.C. § 945 (right-of-way for canals and ditches to be reserved in patents for certain designated lands); Act of Feb. 25, 1920, ch. 85, § 29, 41 Stat. 449, *codified in* 30 U.S.C. § 186 (easements and rights-of-way for certain purposes to be reserved from any permit, lease, occupation or use with respect to mineral lands of the United States); Act of July 24, 1947, ch. 313, 61 Stat. 418 (right-of-way for roads to be reserved in patents issued by the United States for Alaskan lands), *repealed by* Alaskan Omnibus Act, § 21(d)(7), 73 Stat. 146 (1959).

and its precursor in 1859.[12] In these circumstances, the inference is compelling that Congress contemplated no such reservation in enacting the Union Pacific Act.[13] Cf., *e.g., Blau* v. *Lehman,* 368 U.S. 403, 411-413 (1962); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 305-06 (1933).

B. There Is No Basis for Imputing to Congress an Unexpressed Intent to Reserve Rights-of-Way.

The decision below is based not on any evidence of an actual congressional intent, but on the Court of Appeals' own view that the 1862 Congress should have reserved rights-of-way from the Union Pacific grant. The court's conjecture as to what a prudent Congress would have done in 1862 is unfounded. And in any event it cannot justify implying an unexpressed qualification in the statutory grant.

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[12] When Congress was considering the precursor of the Union Pacific Act in 1859, Senator Simmons argued that "every grant of land" should contain a "reservation" preserving "a right to go through it." Cong. Globe, 35th Cong., 2d Sess. 579 (1859). The legislation was subsequently passed by the Senate without the reservation for which Senator Simmons argued. See *id.* at 634. In 1862, Congress specifically considered and rejected an amendment to the Act that would have reserved a right of public entry onto the granted lands for purposes of exploring for and mining minerals. See Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862).

[13] Because it is clear from both the language and the legislative history of the Act that Congress did *not* intend any reservation for rights-of-way, there is no basis for applying in this case the principle that ambiguities in a public grant should be resolved in favor of the Government and against the private grantee, see, *e.g., Northern P. Ry.* v. *United States,* 330 U.S. 248, 257 (1947). That principle of construction does not "justify the withholding of that which it satisfactorily appears the grant was intended to convey." *Russell* v. *Sebastian,* 233 U.S. 195, 205 (1914); accord, *United States* v. *Denver & R.G. Ry.,* 150 U.S. 1, 14 (1893).

The Court of Appeals found itself "unable" to accept the conclusion compelled by an examination of the language and legislative history of the Act. Pet. App. xi. The court declared that Congress' underlying purpose in granting lands to aid construction of the western railroads was "to give access to the unsettled territories and to encourage settlement and development of those lands;" and it asserted that a reservation for rights-of-way across the granted lands was necessary to further this general purpose. Pet. App. xi. To hold that no easement-of-way had been reserved, the court said, "would be to ascribe to Congress a degree of carelessness or lack of foresight, which . . . would be unwarranted." Pet. App. xi.

The lower court's view of sound legislative policy for the checkerboard grants might seem plausible from a contemporary perspective, but the Act must be construed from the viewpoint of the Congress that passed it. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 64 (1878); *United States* v. *Union P. R.R.,* 91 U.S. 72, 81 (1875). From that perspective, no need to provide for reservations of rights-of-way was apparent.

By 1862, Congress already had the benefit of long experience with checkerboard grants. It had been making grants in checkerboard form since the 1820's, in aid of highways and canals as well as railroads.[14] None of these prior land-grant statutes provided for any reservation of rights-of-way across the granted lands; and, so far as can be determined, no such reservation had

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[14] See, *e.g.,* Act of March 3, 1827, ch. 56, 4 Stat. 236 (canal); Act of March 3, 1827, ch. 93, 4 Stat. 242 (road); Act of June 18, 1838, ch. 114, § 1, 5 Stat. 245 (canal); Act of Sept. 20, 1850, ch. 61, § 2, 9 Stat. 466 (railroad).

been asserted by the Government under any of them. The absence of a reservation for rights-of-way in these grants appears not to have created any significant difficulty.[14] In these circumstances, the 1862 Congress had no reason to perceive a need to reserve rights-of-way. And given the development that the West has enjoyed over the past 100 years without the reservation just discovered in the decision below, it is hardly obvious that Congress' failure to share the court's modern perception of such a need reflects any "carelessness or lack of foresight" (Pet. App. xi).

But assuming that the omission of reserved rights-of-way could be considered neglectful, the omission cannot be repaired by implying a reservation that Congress never mentioned. This Court made clear a century ago that the grants made under the Union Pacific Act are subject only to such reservations as are expressed in the statute. In *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491 (1878), the Court said "there can be no reasonable doubt" that Congress' intent in the Act "was to aid in the construction of the [rail]road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ." *Id.* at 497 (emphasis added).[15] Under

[14] An examination of the Annual Report of the Commissioner of the General Land Office for the years 1827 through 1862 has failed to reveal any claim of reserved rights-of-way in the prior land-grant statutes or any problem of access across granted lands.

[15] At issue in *Missouri, K. & T. Ry.* was some 90,000 acres of land in Kansas. Kansas Pacific Railway claimed the land under a grant made to its predecessor in the Union Pacific Act of 1862; Missouri, Kansas & Texas Railway claimed the same land under an 1863 congressional grant. The Court held that Kansas Pacific's title to the lands "took effect by relation as . . . of 1862," upon location and construction of its road, "so as to cut off all intervening claim-

that principle, the Court of Appeals was not free to imply a reservation for rights-of-way, no matter how strongly it believed that rights-of-way were required."

The Court has had good reasons to adhere so closely to the express terms of congressional land grants. In the first place, under Article IV, § 3, cl. 2 of the Constitution, "[t]he power over the public lands [is] entrusted to Congress . . . *without limitations*."[16] *E.g.*, *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940) (emphasis added). In light of this allocation of constitutional authority, the Court has emphasized on a number of occasions that "it is not for the courts to say how that trust shall be administered"; rather, it is solely "for Congress to determine" on what terms and conditions public lands are to be used, conveyed or retained."[17] *Light* v. *United States*, 220 U.S. 523, 537

ants *except in cases where reservations were specifically made*" in the Union Pacific Act. 97 U.S. at 498 (emphasis added). Since the 1862 Act was silent regarding the reservation of "any portion of the designated lands for the purpose of aiding in the construction of other roads" (*id.* at 498-99), the Court concluded that full title to the disputed lands "had already passed from the government" to Kansas Pacific when Congress made the 1863 grant, and the Missouri, Kansas & Texas could claim nothing. *Id.* at 500-01.

[16] Cf. *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 430 (1881) ("[W]here any qualification is intended in the operation of the grant of lands, . . . it is designated."). See also *Stuart* v. *Union P. R.R.*, 227 U.S. 342, 353-54 (1913).

[17] Article IV, § 3, cl. 2 provides in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

[18] In accordance with this view, administrative authorities, in issuing land patents, likewise may not reserve or limit what Congress has in fact granted. See, *e.g.*, *Shaw* v. *Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback* v. *Hawke*, 115 U.S. 392, 406 (1885).

(1911); accord, *e.g.*, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294-95 (1958); *United States* v. *California*, 332 U.S. 19, 27 (1947).

The policy of restrained judicial construction of land grants is also rooted in the fact that these grants are the foundation of land titles across the West. Where land titles are concerned, the law has traditionally recognized the special need for certainty and predictability, on which both the value and the marketability of land depends.[20] That venerable principle of the common law applies with full force to the construction of land-grant statutes.[21] Indeed, this Court recognized long ago that a construction of a statute that might "disturb numerous titles" should be eschewed, "unless clearly the proper one."[22]

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[20] In another context, this Court has emphasized that Congress "intended" that such grants as the Union Pacific Act "should be of present force, . . . *with reasonable certainty.*" *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900) (emphasis added).

[21] The need for certainty is clearly recognized in this Court's determination in *Missouri, K. & T. Ry.* that Congress intended to make an absolute conveyance of the lands granted in the Union Pacific Act, subject only to such reservations "as were *specifically mentioned*." See p. 14, above. The Court placed considerable reliance on the fact that its "construction" of the Act should "prevent controversies" in the future over title to lands granted not only in the Union Pacific Act itself but also in "all similar congressional grants." 97 U.S. at 497-98.

[22] *Beals* v. *Hale*, 45 U.S. (4 How.) 37, 52 (1846). See also *Louisiana* v. *Garfield*, 211 U.S. 70, 76 (1908) ("[L]ong continued understanding [of] . . . special provisions" of a statute would not be overturned on the basis of a "general clause" in subsequent legislation, where the proposed construction would disturb "a great number of titles to a very large amount of land."); *Lessee of Doolittle* v. *Bryan*, 55 U.S. (14 How.) 563, 567 (1852) ("[A] court should be . . . astute in avoiding a construction which may be productive of much litigation and insecurity of titles.").

The wisdom of that policy is dramatized by the potential effect of the decision below. Over the past century, the lands originally granted to the railroads under the Union Pacific Act have passed to thousands of private owners, including the petitioners in this case, on the assumption of clear and certain title. By indulging its own 20th Century notion of sensible policy, the court has cast a cloud of indefinite scope over these thousands of titles.[23] A construction productive of such uncertainty and unfairness should be rejected unless compelled by a clear expression of congressional intent.[24] It must certainly be rejected here, where there is not only an absence of clear expression of such an intent, but no expression at all.

II. Established Administrative Construction and Practice Confirm the Absence of Any Reservation for Rights-of-Way.

In construing a statute, this Court accords "considerable weight" to a "consistent and longstanding interpretation" of the statute by the authorities responsible for its administration. *E.g.*, *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). Administrative construction and practice have often guided the Court in construing railroad land grants such as the Union Pacific Act. See, *e.g.*, *United States* v. *Union P. Ry.*, 148 U.S. 562, 571-72 (1893); *Southern P. R.R.* v. *United States*, 189 U.S. 447, 452 (1903). The Government's construction and practice under the Union Pacific Act are inconsistent with the reservation asserted in this case, and thus provide an independent reason why the courts should decline to imply such an unexpressed reservation at this late date.

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[23] See p. 28 n.45, below.

[24] See cases cited p. 16 n.22, above.

As early as 1887, the Department of the Interior construed the railroad land grants, including the Union Pacific grant, *not* to have reserved any rights-of-way across the granted lands. In that year, the Secretary of the Interior recommended that legislation be enacted establishing a public highway around the boundaries of each section of western land, with the section lines marking the highway's center. The purpose was to ensure access to all public lands, including the even-numbered public sections surrounded by odd-numbered sections that had been granted to private parties. Recognizing that Congress had not reserved any rights-of-way in such grants as the Union Pacific Act, the Secretary observed that the legislation he proposed "should provide for necessary compensation" for the property to be taken from sections previously granted to the railroads and others.[23]

This Interior Department construction of the grants is not only longstanding but also, until this case, consistent. The public land records in the West reflect numerous transactions in which the United States has *purchased* easements or similiar interests from the private owners of granted lands, including each of the amici. So far as we can determine, this is the first occasion on which the United States has asserted that it already holds a reserved right-of-way across any lands granted

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[23] I *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887).

It is not difficult to understand why the Department of the Interior adopted this view. In an administrative decision rendered in 1885, the Commissioner of the Department's General Land Office held that where Congress had provided for express reservations from granted lands, no other reservations could be implied. See *Northern P. R.R.* v. *Miller*, reported in I *Report of the Secretary of the Interior for the Year Ending June 30, 1885*, at 353, 354 (1885).

in the Union Pacific Act.[24] As the trial court expressly found, "[f]or 110 years after the grant of fee lands made to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency . . . of the United States construed the grant . . . as conferring any right upon the United States . . . or the public to traverse the lands granted to the railroad." Pet. App. v.

The longstanding failure of administrative authorities to claim any reserved rights-of-way is especially significant here. The reservation at issue is not the type of interest that would have gone unasserted by generations of public land officials if in fact such a reservation were thought to exist.[25] The absence of any such "assertion . . . by those who presumably would be alert" to make it is persuasive evidence that no right-of-way was reserved. Cf. *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949).

Moreover, the silence of a century of public land officials has been relied upon in countless land transactions throughout the West. The lands granted under the Union Pacific Act have been conveyed and reconveyed with no notice of any reservation for public rights-of-way; successive purchasers have acquired the lands, agreed to prices, and made improvements on the

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[24] None of the cases upon which the court below relied (Pet. App. xii-xvi) involved an assertion, much less a recognition, of any reservation for rights-of-way in the United States. See pp. 24-26, below.

[25] Even before the trial court in this case, the United States did not assert any implied reservation of rights-of-way; it was only in the Court of Appeals that the United States first invoked such a theory. See Pet. App. xxv.

assumption that they would enjoy clear title.[29] This extensive reliance on administrative silence should preclude the implication of a contrary congressional intent in this case even if the absence of any evidence of such an intent did not.[30]

III. The Authorities Relied on in the Decision Below Provide No Support for the Conclusion That Congress Intended a Reservation for Rights-of-Way.

The Court of Appeals purported to find some congressional and judicial recognition that rights-of-way had been reserved from the Union Pacific grant, in the Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-66, and in this Court's decisions in *Camfield* v. *United States*, 167 U.S. 518 (1897), and *Buford* v. *Houtz*, 133 U.S. 320 (1890). Pet. App. xi-xvi. The court's reliance on these authorities was misplaced. None of them refers to any reservation for rights-of-way in the grants made under the Union Pacific Act or even purports to construe that Act. Instead, the cited authorities are concerned with issues of access wholly unrelated to Congress' intent in the Union Pacific Act. To the extent

[29] Some indication of the number of transactions and owners involved can be seen in the fact that UP Land and SP Land together now hold only some 2.6 million of the 34 million acres granted under the Union Pacific Act.

[30] Cf. *Iron Silver Mining Co.* v. *Elgin Mining & Smelting Co.*, 118 U.S. 196, 208 (1886), where the Court emphasized that rejection of the Land Department's longstanding construction of the statute at issue "would disturb titles derived" from the Land Department's patents and "lead to great confusion and litigation." Cf. also *United States* v. *Union P. Ry.*, 148 U.S. 562, 572 (1893), where the Court interpreted the Act at issue consistently with "the construction placed upon it by the Land Department for eighteen years, under which construction [the relevant] lands [had] been put upon the market and sold . . . ."

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[31] Accord, *e.g.*, *Rainwat*
(1958); *Penn Mutual Lif*
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The issue here is the intent of the
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er v. *United States*, 356 U.S. 590, 593-94
e Ins. Co. v. *Lederer*, 252 U.S. 523, 537-

ties. And neither gives any indication that the statute is premised on the existence of such a reservation or was intended to enforce any existing right of access over private lands.

The Unlawful Inclosures Act was adopted to remedy the distinct problem of intentional appropriation of public lands by certain private owners, who were "enclosing large areas of lands of the United States . . . [as] mere trespassers, without a shadow of title to such lands, and surrounding them by barbed wire fences . . . ."[32] *Cameron* v. *United States,* 148 U.S. 301, 305 (1893). In accordance with this purpose, the Act is addressed in terms only to unlawful "inclosures of . . . public lands . . . of the United States" and to "prevent[ing] or obstruct[ing] any person from peaceably entering upon . . . or transit[ing] over . . . *public* lands" by use of "unlawful means."[33] 43 U.S.C. §§ 1061, 1063 (emphasis added). In view of its focus on the unlawful appropriation of the public domain,[34] the Act restricts

[32] As a leading authority on public land law has noted, by the 1880's, "[h]undreds and thousands of acres of public land were illegally fenced and threats of violence made against anyone who cut the fences." P. Gates, *History of Public Land Law Development* 467 (1968). The Unlawful Inclosures Act "was designed to prevent [such] illegal fencing of public lands. . . ." *Omaechevarria* v. *Idaho,* 246 U.S. 343, 349-50 (1918).

[33] "Unlawful means" include the use of "force, threat, intimidation, . . . fencing or inclosing . . . ." 43 U.S.C. § 1063.

[34] Representative Payson, the sponsor of the Act in the House, explained the Act's purpose as follows:

> "[M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them. . . .
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> . . . .
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> "It is to open this land up to sale and settlement that this bill is introduced. . . . [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands, which he is prevented from doing for the reason that they are fenced by foreigners. . . ." 15 Cong. Rec. 4769 (1884).

See also S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885) ("The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent."); H.R. Rep. No. 1325, 48th Cong., 1st Sess. 7 (1884); 15 Cong. Rec. 4769 (1884) (remarks of Rep. Henley); 15 Cong. Rec. 4770 (1884) (remarks of Mr. Rogers).

the use of private lands only insofar as such use constitutes a "mere subterfuge" for enclosing and monopolizing public lands; otherwise, the statute was "not intended to interfere with" private owners' rights to the exclusive use and enjoyment of their property.[35] Thus, the Unlawful Inclosures Act provides no indication that the 1885 Congress believed the Congress in 1862 had reserved general rights-of-way across any land-grant lands.[36]

[35] *United States* v. *Rindge,* 208 F. 611, 623 (S.D. Cal. 1913); accord, *Camfield* v. *United States,* 167 U.S. 518, 528 (1897), *quoted at* pp. 24-25, below. See also *Golconda Cattle Co.* v. *United States,* 214 F. 903 (9th Cir. 1914); *Potts* v. *United States,* 114 F. 52 (9th Cir. 1902).

[36] The Court of Appeals apparently believed that Congress passed the Unlawful Inclosures Act in order to keep open reserved public rights-of-way over the lands granted under the Union Pacific Act and other similar land-grant acts. But, if that had been Congress' purpose, the Unlawful Inclosures Act plainly was unnecessary, since the United States unquestionably could have sued in its proprietary capacity to keep any reserved public rights-of-way open and unobstructed. Cf. *Camfield* v. *United States,* 167 U.S. 518, 525 (1897). Indeed, if—as the Court of Appeals evidently thought—Congress was concerned in 1885 with access over previously granted private lands, the enactment of the Unlawful Inclosures Act would seem ultimately to indicate that the 1885 Congress did *not* believe that public rights-of-way across the granted lands had been reserved. In any case, as shown above, Congress' true concern in enacting the Unlawful Inclosures Act was to prevent unlawful monopolization of public lands and not to create or enforce any right of access over private lands.

This Court's decision in *Camfield* v. *United States, supra,* on which the Court of Appeals also relied, merely applied the Unlawful Inclosures Act to the very practice that the Act was passed to prevent. Private owners of odd-numbered sections that were originally part of the Union Pacific grant had built fences on their property enclosing eighteen sections of Government land. As constructed, the fences were completely useless for enclosing any of the private lands; they could only have been intended to enclose and appropriate the lands of the Government." The Court found that the fences were "certainly within the letter" of the Unlawful Inclosures Act and sustained the constitutionality of the Act as applied to the defendants' transparent attempt to monopolize the enclosed public lands.[38] See 167 U.S. at 522-28.

Nowhere in the decision did this Court suggest that the United States held any reserved rights-of-way across the defendants' lands. On the contrary, the Court emphasized that the owner of granted land "is

[37] The defendants' fences enclosed an entire township containing 36 sections of land. On each side, the fence was located just inside the outer section line of the three odd-numbered, privately owned sections and just outside the outer section lines of the three even-numbered, publicly owned sections. As a result, no individual section was enclosed on four sides by the fence; it was obvious that the fence was intended solely to enclose the entire township including the Government's land. See diagram printed in 167 U.S. at 520.

[38] The defendants argued that the Unlawful Inclosures Act was unconstitutional if "construed so as to apply to fences upon private property." 167 U.S. at 522. The Court found such application of the Act to be within Congress' constitutional power to require abatement of "nuisances" affecting United States property. See *id.* at 525. The Court placed no reliance on any retained public right in the relevant private properties.

entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor," so long as he "confines his enclosures to his own land." *Id.* at 528. Thus, the Court clearly recognized that owners of lands granted under the Union Pacific Act and other similar acts held absolute and unqualified title to their land, and might fence their lands for legitimate purposes even if they thereby incidentally prevented access to adjacent public lands. As a result, *Camfield* reflects, if anything, a "judicial recognition" (Pet. App. xvi) that Congress did *not* reserve any general rights-of-way in making the Union Pacific grant.[39]

Nor does *Buford* v. *Houtz, supra,* reflect any judicial recognition that Congress intended to reserve from the Union Pacific Act a right of access over the granted lands. That decision was concerned solely with a 100-year-old "custom" allowing sheep and other livestock to run free and graze upon unenclosed lands, whether public or private. See 133 U.S. at 326-31. Under that ancient custom, the Court determined, sheepmen were entitled to trail their stock across unenclosed private, checkerboard lands.[40] The Court's recognition of such a custom certainly does not indicate any view that Congress intended to reserve a very different right of access in making the Union Pacific grant. In short, *Buford*—like *Camfield* and the Unlawful Inclosures Act—affords no basis for inferring the existence of con-

[39] If public rights-of-way had been reserved from Congress' grants, the private owners obviously would not have been entitled to enclose their own lands "regardless of any detriment" to others.

[40] See also *Lazarus* v. *Phelps,* 152 U.S. 81, 84-85 (1894) (*Buford* recognized the "custom of permitting cattle to run at large without responsibility for their straying upon the lands of others . . . .").

gressionally reserved rights-of-way that the decision nowhere considered or discussed.[41]

IV. The Decision Below Affords No Basis for Defining the Limits of Any Reservation for Rights-of-Way.

The unsettling effect of the decision below is compounded by the fact that the scope of the reserved rights-of-way it announces is uncertain and potentially unascertainable. Unlike the common law easement of necessity, which has been found inapplicable in this case,[42] a public easement derived solely from an unexpressed congressional intent could be subject to widely varying constructions, both from court to court and from one tract to another.

Common law ways of necessity are implied as a matter of law in favor of landlocked parcels of private

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[41] *Mackay* v. *Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), upon which the Court of Appeals also relied (Pet. App. xiv-xvi), was decided on the basis of *Buford* (see *id.* at 120) and likewise is without relevance for the question whether Congress intended to reserve any rights-of-way across the lands granted in the Union Pacific Act.

[42] The trial court found no common law easement of necessity "in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands." Pet. App. v; accord, *e.g.*, *Simonson* v. *McDonald*, 311 P.2d 982, 984-86 (Mont. 1957); *Alcorn* v. *Reading*, 66 Utah 509, 243 P. 922, 926 (1926); *State* v. *Black Bros.*, 115 Tex. 615, 297 S.W. 213, 218-19 (1927). See also p. 8 n.6, above. Of course, if a common law easement of necessity could be implied here, such an easement would be strictly limited in accordance with the common law principles described below.

property.[43] Such easements have been narrowly restricted by reference to the necessity from which they arise. The courts have made clear that affected owners and their properties are not to be burdened by such easements any more than is required to permit reasonable access to the landlocked parcels.[44]

On its face, the statutory reservation for a right of public access imputed to Congress by the Court of Appeals is not so clearly limited. It is defined exclusively by a supposed congressional intent of which there is no tangible evidence and which may be as elastic as a court's conception of what might have been conducive

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[43] See, *e.g.*, *United States* v. *Rindge*, 208 F. 617, 620 (S.D. Cal. 1913); *Westminster Investing Corp.* v. *Kass*, 266 F. Supp. 597, 599-600 (D.D.C. 1967). See generally *Restatement of Property* §§ 474-76 (1944).

[44] The holder of a common law way of necessity is restricted to reasonable use of the way for the purposes of going to and from his own property. See, *e.g.*, *Holman* v. *Patterson*, 34 Tex. Civ. App. 344, 78 S.W. 989-991 (1904). See also 2 G. Thompson, *Real Property* § 386, at 565-66 (1961). The holder may not expand his use to impose any undue additional burden on the affected property, see, *e.g.*, *Murphy* v. *Mart Realty of Brockton, Inc.*, 348 Mass. 675, 205 N.E.2d 222, 225 (1965); on the contrary, he is required to use the "way in such manner as to avoid unnecessary inconvenience to the owner of the [burdened] estate," see, *e.g.*, *City of Whitwell* v. *White*, 529, S.W.2d 228, 235 (Tenn. Ct. App. 1974). See also *Fleishon* v. *Philadelphia Zoning Bd.*, 385 Pa. 295, 122 A.2d 673, 674-75 (1956); 2 G. Thompson, *Real Property* § 386 (1961). Moreover, such common law ways are located so as to encroach on the affected property no further than necessary to provide the holder with reasonable access to his parcel. See, *e.g.*, *Morgan* v. *Culpepper*, 324 So. 2d 598, 605-06 (La. Ct. App. 1975), *aff'd*, 326 So.2d 377 (La. 1976). See also II *American Law of Property* § 8.66, at 278 (A. Casner ed. 1952). Indeed, the common law normally allows the burdened owner to designate a reasonable route for the way across his lands. See II *American Law of Property* § 8.66, at 278 (A. Casner ed. 1952).

to the development of the West. Such amorphous roots give no reliable guide as to the extent of the burden that the reservation will be held to permit.

Thus, if the decision below should stand, the present owners of granted lands face the prospect of highly intrusive claims to access across their property, depending on the uses to which the Government puts adjacent public lands and the nature and number of the interested public. A limited right-of-way across the corner of a granted section might itself depreciate the value of the land significantly. But a crowded superhighway through the heart of the section could make the land unusable for some purposes and could greatly impair its worth for others.

To create a cloud on titles of such indefinite scope is antithetical to traditional notions of sound property law. Such an indefinite cloud is the inevitable consequence of a statutory construction that implies unexpressed reservations from nothing more than a court's own conception of sound policy. That consequence provides yet another reason in addition to those already discussed above why judicial implication of unexpressed reservations in the land-grant acts should not be allowed. Moreover, if this Court should somehow conclude that some reservation for rights-of-way is implied in the Union Pacific Act, notwithstanding the lack of any supporting evidence or authority, it should at least make clear that any such rights must be limited by principles of minimum intrusiveness such as those applicable to common law easements.[48] And it should

[48] In its reply brief (p. 4) before the Court of Appeals, the United States indicated that it was asserting only a public "right of access over the common interlocking section corners" of the granted odd-numbered sections. While the Court of Appeals concluded that Congress had intended to reserve an easement for access, it did not attempt to define the scope or location of that easement.

confirm that any implied rights of access across granted lands in the checkerboard are reciprocally available to private owners seeking access to their own lands across the public sections. An imputed congressional intent to reserve must be accompanied by an imputed intent to act reasonably and evenhandedly, as well as to minimize the potential for uncertainty and hardship.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed.

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November 1978